Positive Electrical Enterprises, Inc. and its alter egos CNY Electrical Maintenance Corp. and CNY Electrical Service Group, Inc. d/b/a Positive Electric *and* International Brotherhood of Electrical Workers, Local 43. Case 3–CA–25037

September 30, 2008

SUPPLEMENTAL DECISION AND ORDER REMANDING

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

The General Counsel seeks a default judgment in this case on the ground that the Respondents have failed to file an answer to the compliance specification. For the reasons that follow, we grant the motion in part and deny it in part.

On September 23, 2005, the Board issued a Decision and Order[1] that, among other things, ordered Respondent Positive Electrical Enterprises, Inc. (Positive) to comply with the terms and conditions of two collective-bargaining agreements and make whole bargaining unit employees and benefit funds for losses resulting from Positive's violation of Section 8(a)(5) and (1) of the Act. On October 27, 2006, Positive entered into a stipulation whereby it agreed to apply the terms of the collective-bargaining agreements and pay a compromised amount of backpay to its unit employees. Positive agreed that if it defaulted upon the terms of the stipulation, the Regional Director could issue a compliance specification alleging that Positive owed the full amount of backpay, less any payments previously made.

A controversy having arisen over whether Positive defaulted upon the terms of the stipulation by failing to apply the terms of the collective-bargaining agreements, on April 30, 2008,[2] the Regional Director issued a compliance specification and notice of hearing.[3] The specification asserts that Respondents CNY Electrical Maintenance Corp. (Maintenance) and CNY Electrical Service Group, Inc. d/b/a Positive Electric (Service) are alter egos of Positive and thus, jointly and severally liable for remedying Positive's unfair labor practices, including the payment of backpay, interest, and other relief required by the Board's Order.[4] The specification sets forth backpay calculations for 19 discriminatees, alleges amounts due to benefit funds, and notifies the Respondents that they should file timely answers complying with the Board's Rules and Regulations.

On May 18, Anthony and Sandra Cirrincione submitted a letter to the Region. In their letter, the Cirrinciones state that they no longer own or can represent Positive or Service and that both entities are "in the hands of the bankruptcy court." The letter advises the Region to contact the owner of Maintenance because the Cirrinciones have "nothing to do with them [sic]." Finally, the Cirrinciones represent that they are without financial resources to retain counsel. The Cirrinciones have not sworn to this letter or a served a copy of it on the other parties.

On May 20, Brian Corset submitted a letter to the Region, purporting to be the sole owner of Maintenance. The letter asserts that Maintenance's only relationship with Positive was that Corset "bought the work van and took care of some of there [sic] customers, that's it." Corset also asserts that Maintenance "has a lot of debt, no assets and a very dim future." He represents that he cannot afford an attorney and inquires if the Board can provide him with one. Corset has not sworn to this letter or a served a copy of it on the other parties.

By letter dated May 22, the Region informed both the Cirrinciones and Corset that, pursuant to Rule 102.56 of the Board's Rules and Regulations, no answers to the compliance specification had been received and that, unless an answer was filed by May 28, a motion for default judgment would be filed. In a May 23 letter to the Cirrinciones, the Region acknowledged receipt of their May 18 letter, asserted that the only debtors in the bankruptcy case were the Cirrinciones, as individuals, and advised that their bankruptcy status did not relieve Positive of the responsibility for filing an answer. By letter dated May 23, the Region acknowledged receipt of Corset's May 20 letter, advised Corset that the Board could not provide him with counsel, and stated that his pro se status did not relieve him from the obligation to file an answer. These May 23 letters restate the Region's intent to seek default judgment if the Respondents do not file an answer by May 28, but do not address why the Respondents' letters were deficient or cite any specific procedural requirements.[5]

On June 9, the General Counsel filed with the Board a Motion to Transfer Proceedings to the Board and for

[1] 345 NLRB 915.

[2] All subsequent dates are in 2008.

[3] The specification states that Respondent Positive has paid the compromised backpay amount of $11,000.

[4] The specification names Anthony and Sandra Cirrincione as the officers of Positive. It identifies Anthony Cirrincione as the sole owner and officer of Service. The specification does not name the owners or officers of Maintenance. However, for Maintenance, the Region served "Brian Corsette" with the specification and notice of hearing.

[5] According to the General Counsel's uncontroverted motion, Sandra Cirrincione telephoned the Region on May 28. During this call, Cirrincione reported that she and her husband considered their May 18 letter to be an answer. The Region advised Cirrincione that the May 18 letter did not meet the requirements of Sec. 102.56 and it intended to file a motion for default judgment. The General Counsel does not assert that the Region specifically explained why the May 18 letter was deficient.

Default Judgment, with exhibits attached. The General Counsel argues that the Respondents' letters are not legally sufficient answers under Section 102.56(a) because they are not sworn to and have not been served on the other parties.[6] Further, the General Counsel asserts that the Respondents' letters are not legally sufficient under Section 102.56(b) because they fail to specifically admit, deny, or explain any allegation in the compliance specification. Absent a legally sufficient answer, the General Counsel urges the Board to grant default judgment.[7]

On June 18, the Board issued an Order Transferring the Proceeding to the Board and a Notice to Show Cause why the motion should not be granted. Positive, Service, and Maintenance did not respond to the Notice to Show Cause. Accordingly, the allegations in the motion are undisputed.

Ruling on the Motion[8]

Section 102.56(a) of the Board's Rules and Regulations provides that a respondent shall file an answer within 21 days from service of a compliance specification. The answer must be served on the other parties and in writing, the original being sworn to by the respondent or by a duly authorized agent. Section 102.56(b) requires that an answer shall specifically admit, deny, or explain each and every allegation of the specification. Finally, Section 102.56(c) provides that if a respondent fails to timely file any answer to the specification or sufficiently deny any allegation as required by 102.56(b), the Board may, either with or without taking evidence in support of the allegation of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate.

When applying Section 102.56, "the Board has shown some leniency toward respondents who proceed without benefit of counsel." *Nick & Bob*, 345 NLRB at 1093 (quoting *Convergence Communications*, 342 NLRB 918, 919 (2004)). Under certain circumstances, the Board has accepted a pro se respondent's unsworn answer to a compliance specification. See, e.g., *Workroom for Designers*, 289 NLRB 1437, 1438 (1988).[9] Moreover, the "Board generally will not reject an improperly served document absent a showing of prejudice to a party." *Paolicelli*, 335 NLRB 881, 882 (2001) (quoting *Century Parking*, 327 NLRB 21, 21 fn. 7 (1998)). Here, neither the General Counsel nor the Union has claimed any prejudice. In fact, no claim has even been made that the Union is unaware of the Respondents' letters. See *Paolicelli*, 335 NLRB at 882. "While the Board strongly encourages strict compliance with its procedural rules, including those concerning the manner of filing and serving answers to complaints, the Board recognizes that the law favors a determination on the merits." Id. Therefore, under the particular circumstances here, we decline to grant the General Counsel's motion for default judgment based on the pro se Respondents' failure to have their letters sworn to or served on the other parties.

We disagree with the General Counsel's contention that the Respondents have failed to sufficiently deny *all* of the specification allegations. As described above, the Cirrinciones assert that Maintenance is not affiliated with Positive and Service. Moreover, Corset claims sole ownership of Maintenance and reports a minimal relationship with Positive. We find that these responses constitute general denials of the specification's assertion that Maintenance is an alter ego of Positive. To this end, the Board has found that a general denial of alter ego status is sufficient to warrant a hearing. *Pallazola Electric*, 312 NLRB 569, 571 fn. 6 (1993) (citing *Best Roofing Co.*, 304 NLRB 727, 728 (1991)). Consequently, we shall order a hearing on this issue.

[6] The General Counsel does not argue that the Respondents failed to timely submit their letters.

[7] We shall treat those portions of the General Counsel's motion which argue that the Respondents' letters are not legally sufficient answers under Sec. 102.56(a) as a motion for default judgment. Although not titled as such, we shall treat those portions of the General Counsel's motion which argue that the Respondents' letters are not legally sufficient under Sec. 102.56(b) as a motion for summary judgment. "Summary judgment is appropriate when a respondent does not raise a genuine issue of material fact." *Nick & Bob Partners*, 345 NLRB 1092, 1093 (2005).

[8] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[9] We note that the Region did not inform the Respondents of the deficiencies in their letters before filing its motion. The Board's Casehandling Manual states that before filing a motion with the Board, the General Counsel should advise a respondent in writing that its answer is deficient. NLRB Casehandling Manual (Part Three) Compliance Proceedings Sec. 10652.2. "While compliance with that requirement is the better practice, it is not a legal mandate." *Nick & Bob*, 345 NLRB at 1093 fn. 5. The Board has also stated that "[n]either the Board's Rules and Regulations nor our decisions require the Region to grant a respondent an opportunity to amend a defective answer before the General Counsel files for summary judgment." *Aquatech, Inc.*, 306 NLRB 975, 975 fn. 6 (1991). Chairman Schaumber acknowledges the foregoing as extant precedent and applies it institutionally, noting that we are denying default judgment in this case. However, in his view, compliance with the Casehandling Manual's notice of deficiency requirements should be mandatory at the very least where pro se litigants are involved. See, e.g., *Nick & Bob*, 345 NLRB at 1094 (Member Schaumber concurring).

The Respondents' letters do not, however, deny any of the remaining specification allegations.[10] Therefore, in the absence of good cause for the Respondents' failure to raise any genuine issues of material fact concerning the remaining specification allegations, we grant the General Counsel's motion and deem those allegations to be admitted as true as against Respondents Positive and Service. Accordingly, we conclude that the amounts of backpay due the unit employees are as stated in the compliance specification, and we will order Respondents Positive and Service to pay those amounts, plus interest accrued to the date of payment, subject to the appropriate credit for payments already made. In addition, we conclude that the benefit fund payments owed are as stated in the compliance specification, and we will order Respondents Positive and Service to pay those amounts to the funds on behalf of the unit employees, plus interest accrued to the date of payment.

ORDER

IT IS ORDERED that the General Counsel's Motion for Default Judgment is denied insofar as it argues that the Respondents failed to file legally sufficient answers.

IT IS FURTHER ORDERED that the General Counsel's Motion for Default Judgment is granted in all other respects, except as to the liability of CNY Electrical Maintenance Corp.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 3 for the purpose of arranging a hearing before an administrative law judge for the purpose of taking evidence concerning the allegation that CNY Electrical Maintenance Corp. is an alter ego of Positive and thus, jointly and severally liable for remedying Positive's unfair labor practices, including the payment of backpay, interest, and other relief required by the Board's Order. The judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.

IT IS FURTHER ORDERED that Respondents Positive Electrical Enterprises, Inc., Mattydale, New York, and CNY Electrical Service Group, Inc. d/b/a Positive Electric, Whitesboro, New York, their officers, agents, successors, and assigns, shall make whole the individuals named below by paying them the amount following their names, plus interest accrued to the date of payment, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws, subject to the appropriate credit for payments already made. Respondents Positive Electrical Enterprises, Inc. and CNY Electrical Service Group, Inc. d/b/a Positive Electric shall also make whole those individuals for payments due the benefit funds by paying the amounts set forth, plus interest accrued to the date of payment, as prescribed in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In summary, the amounts owed by Positive Electrical Enterprises, Inc. and CNY Electrical Service Group, Inc. d/b/a Positive Electric are as follows:

BACKPAY:

DISCRIMINATEE	NET BACKPAY
Alexander, Charles	$ 1,882
Carpenter, Allen	23,666
Corsett, Brian	33,599
Craner, Norman	8,058
Gaiser, David	4,720
Garcia, Reynaldo	3,617
Gonzalez, Abel	3,449
Hart, Kenneth[11]	20,279
Ivanchuk, Lilia	270
Jones, Clinton	897
Jones, Mark	7,641
Martes, Jesus	2,460
Morey, Douglas	87
Printup, Leonard	1,690
Quigg, David	3,312
Robinson, Gene	3,080
Scherz, James	648
Tavarez, Irving	8,818
Wilcox, Matthew	234
TOTAL BACKPAY:	$ 128,407

BENEFIT FUND PAYMENTS:

Health	$ 83,373
Pension	30,458
Annuity	4,976

[10] The Respondents' financial circumstances do not warrant denying the General Counsel's motion because "the issue in a compliance proceeding is the amount due and not whether a respondent is able to pay." *Corbin, Ltd.*, 344 NLRB 382, 382–383 (2005) (citations omitted). Additionally, we note that the Cirrinciones do not deny the liability of Positive and Service, but instead assert that pending bankruptcy proceedings preclude them from filing answers on behalf of those entities. However, "it is well established that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition." Id. at 383 (citing *Cardinal Services*, 295 NLRB 933, 933 fn. 2 (1989)).

[11] The compliance specification, as set forth in the underlying exhibits, incorrectly lists the total backpay award for Kenneth Hart as $20,280. The backpay Order reflects the correct total.

JATC	40,447
NEBF	10,034
TOTAL BENEFIT PAYMENTS:[12]	169,288

COMBINED TOTAL DUE:[13]	$ 297,695
CREDIT FOR PAYMENTS MADE:	[11,000]
FINAL TOTAL DUE:	$ 286,695

[12] The compliance specification incorrectly lists the total amount owed to benefit funds as $169,286. The backpay Order reflects the correct total. The sums owed to benefit funds reflect the amounts stated for periods August 20, 2002 to December 31, 2005, and October 27, 2006, to May 31, 2007, rather than as set forth in the "Summary of Amount Owing to the Union Funds."

[13] The compliance specification incorrectly lists the combined total due, before the appropriate credit for payments already made, as $297,693. The backpay Order reflects the correct total.